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Supreme Court, U.S.
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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

CIPRIANO A. ARAGON

Petitioner

vs.

STATE OF CALIFORNIA

Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
DIVISION THREE**

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36 pp

QUESTION PRESENTED

Whether it constitutes a denial of the right to a fair opportunity to present a defense under both the Compulsory Process clause of the Sixth Amendment and the Due Process clause of the Fourteenth Amendment where:

Pursuant to a California evidentiary rule established by case law which strictly limits criminal defendants from presenting evidence that another person committed the crime in question, a trial court rules that the accused not be allowed to call a witness who constituted the key and crux of the defense, nor to ask other witnesses about this key person.

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE

The petitioner Cipriano A. Aragon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, entered in this proceeding on July 31, 1986.

PARTIES TO THE PROCEEDING

The named respondent, State of California, shall include as a party John K. Van De Kamp, Attorney General of the State of California.

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Three, unpublished, appears in the Appendix hereto. No opinion was rendered by the Superior Court of Orange County, California.

Jurisdiction

The judgment of the California Court of Appeal, Fourth Appellate District, Division Three, was entered on July 31, 1986. A timely petition for review to the California Supreme Court was denied on November 12, 1986 and this petition for certiorari has been filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257.

Constitutional Provisions Involved

(1) This case involves the Sixth Amendment to the Constitution of the United States which provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(2) This case involves the first section of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with-

out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Brief Summary

On June 14, 1984, Petitioner, Cipriano Aragon, was charged by information with committing a lewd or lascivious act upon a child with force, pursuant to *California Penal Code* Sections 288 (a), 288 (b), and 289 (a).

The victim, seven-year-old Vicky Orozco, had been medically examined on April 19, 1984, whereupon it was found that she suffered from a vaginal injury which had to have occurred sometime within the previous twenty-four hours.

The prosecution claimed that Mr. Aragon caused this injury the previous day, on April 18, according to accusations by the victim.

Contrarily, Mr. Aragon has consistently maintained he is innocent of this crime. His defense is comprised of evidence to the effect that the victim's seventeen-year-old, live-in uncle who was babysitting the victim caused the injury on the evening of April 18.

In the first trial, commencing on November 15, 1984, Mr. Aragon was allowed to present his defense by calling the teenage uncle of the victim to testify. Moreover, Mr. Aragon was allowed to ask the other witnesses about this uncle. The jury witnessed the demeanor of the uncle on the stand, and heard the testimony by and about him impeach the testimony of the victim.

As a result, *four jurors voted Mr. Aragon not guilty*. Consequently, a mistrial was declared.

The prosecution elected to re-try the case. In the second trial, Mr. Aragon was ordered not to call the uncle, Felipe Ramirez, as a witness. In addition, the Petitioner was ordered not to ask any other witnesses about the uncle. The

basis for the court's ruling does not appear on record. However, as discussed in the arguments below in the "Reasons For Granting The Writ Of Certiorari," the judge's ruling might have been supported by California's anomalous *Mendez-Arline* rule.

As a result, the jury returned a unanimous verdict of guilty against Mr. Aragon.

The only explanation for the substantial difference in results between the first and second trials is the *blanket exclusion* by the second trial court of all evidence forming Mr. Aragon's defense.

In sum, Petitioner contends that the wholesale exclusion of *all evidence comprising his defense* in the second trial resulted in his wrongful conviction of the criminal offense charged.

Factual Details

Uncontroverted Facts¹

The events in question concern the dates of April 18 and 19 of 1984. At that time, the victim in this case, seven-year-old Vicky Orozco, lived in her home in Santa Ana, California, with her mother, father, four-year-old brother, seventeen-year-old uncle, three other men including Petitioner, two women and another male child. (RT Prelim. 8-10).

On April 18, shortly after Vicky arrived home from school, her parents left for work at approximately 3:30 in the afternoon. Vicky was left in the care of her seventeen-year-old uncle, Felipe Ramirez.

At approximately 6:00 p.m., Petitioner (Mr. Aragon) arrived home from work. Soon thereafter, he left for the

¹Both the prosecution and Petitioner agree on these facts. However, the victim's testimony was replete with inconsistencies and contradicted the statements of the prosecution's other witnesses and the facts on which all parties agree.

grocery store. The three small children of the household (Vicky, her brother, and Mauricio) accompanied Mr. Aragon in order to buy ice creams. (RT First Trial 266-67).

Mr. Aragon returned with the children a short time later; Vicky testified that her vaginal area was *not hurting* when she returned with her ice cream. (RT Prelim. 65). She then *played and rode a bicycle* outside with neighborhood children until after dark. (RT First Trial 87). She had gone to the bathroom once during this time, but had noticed *no blood* in her panties. (RT Prelim. 72, RT First Trial 93).

Mr. Aragon made his dinner and spent the rest of the evening in his room which he occupied with his steady girlfriend of the past four years and her young son, Mauricio.

Vicky's father came home from work briefly to check on Vicky and her brother at a little after 8:00 p.m. The children were watching television in the living room and all appeared to be normal. The father asked Vicky how she was, and she did not indicate there was anything wrong. When the father left to return to work, Vicky was in the living room with her uncle Felipe Ramirez. (RT First Trial 258-59, RT Second Trial 196-197).

When the mother arrived home at approximately 1:00 a.m. from work, Vicky complained of lower abdominal pain. (U.C.I. Medical Center Emergency Room Treatment Record 2). The next morning, the mother noticed blood in Vicky's underwear which she had worn since the day before. (RT Prelim. 12).

The mother took Vicky for medical examination at the Orange County Medical Clinic and the U.C.I. Medical Center. (CT 255).

Medical Evidence

Examination revealed blood in and around the vaginal area along with two hymenal lacerations. There had been

no penile penetration.

The examining physicians agreed that the injury had been caused sometime in the preceeding 24 hours. (RT Prelim. 85). Dr. Garibaldi said that the blood on the panties was the size of a laid-out dollar bill. (RT Prelim. 87). Furthermore, the doctor testified that blood from such hymenal lacerations would have been *immediate*, not delayed at all. (RT First Trial 138). In addition, Dr. Garibaldi asserted that the pain would have been *acute*, not only at the time of the lacerations but for *some time after that*. (RT First Trial 135-36). Likewise, Dr. Lares, another examining physician, explained that Vicky would have been *in considerable pain for at least the first hour after* receiving such an injury, and would not act normal. (RT Second Trial 164).

Victim's Statement as to Cause of the Injury

When the mother first questioned Vicky about the blood in her pants, Vicky claimed a popsicle stick had slipped and caused the injury. Then, she said it happened when she fell on a bicycle the day before. Later, she contended Petitioner had inflicted the injury.

Prosecution's Contentions

The prosecution contends that the vaginal injury to Vicky occurred during the 15-30 minute period in which she was in the company of Mr. Aragon when he took the three children to the store with him. Vicky testified that Mr. Aragon drove them to his place of employment and left the two boys in the car while he took Vicky into a building. She claims that Mr. Aragon then inserted his finger into her vaginal area and subsequently slapped her. They returned to the car, bought the ice creams, and returned home. Vicky states that she then went out to play until dark.

Defense:

The Petitioner has maintained his innocence throughout the preliminary hearing, and the first and second trials. His

defense is based on the fact that since there was an injury and since he did not cause it, the necessary logical inference is that someone else did cause it. The *uncontroverted medical evidence* by two examining physicians that *pain and blood* would have been *immediate* after such an injury is inconsistent with Vicky's testimony that there was *no pain or blood* after she returned from the store with the boys and Mr. Aragon. It was more likely that the injury occurred later in the evening when Vicky was in the company of the seventeen-year-old uncle Felipe Ramirez.

Evidence Comprising Defense, Excluded in Second Trial

To this end, Mr. Aragon's defense consisted of evidence that the teenage uncle had previously *physically and mentally abused* Vicky, and that Vicky lied under oath about such abuse. The uncle would habitually engage in the sadistic ritual of locking Vicky in the garage, turning off the lights, and telling her there were live snakes crawling around her in the dark garage. She would scream repeatedly, but Felipe would often leave her in there for thirty minute periods. He would do this to punish her for not doing as he asked. He also would slap her for disobedience. Although several members of the household testified to this, Vicky lied under oath saying that her uncle never did such things to her. (RT Prelim. 25, 62, RT First Trial 86, 216, 305).

Furthermore, the uncle had exposed himself in the nude to Vicky in the past, and had shared certain intimacies with her noted by the other household members. (RT First Trial 158-59).

Most importantly, at approximately 9:00 on the evening in question, Mr. Flores, another member of the household, had just left the living room where Vicky remained with her uncle Felipe. Shortly thereafter, Mr. Flores heard "the little girl" *screaming*. When repeatedly questioned by the prosecution in the first trial, he was adamant that it was

customary for Vicky to scream when Felipe would *hit* her and lock her in the dark garage. (RT First Trial 190-92, 216-17).

Appellant also heard the screaming, which lasted approximately a full two minutes. (RT First Trial 274, 293).

This uncle, who had been sleeping on the living room sofa up through the evening in question, was suddenly moved out to sleep in the garage immediately after Vicky's injury, until he moved out of the house altogether two weeks later. (RT First Trial 305).

Lastly, the mother was extremely protective of her younger brother, Vicky's uncle, and stated unequivocally: "I would put my hand in fire for my brother." (RT Prelim. 25).

This comprises the evidence Mr. Aragon, Petitioner, sought to present to the jury; it was admitted in the first trial but excluded in the second trial.

Procedural History

Preliminary Hearing

The preliminary hearing was held on May 31, 1984 in Orange County Municipal Court, as case number 84 CF 00440. Petitioner was ordered to answer for arraignment in Orange County Superior Court.

First Trial

On November 14, the day trial was to begin, the district attorney made a motion in limine that Mr. Aragon not be allowed to present evidence by and about the uncle, Felipe Ramirez, and that the defendant be precluded from introducing any evidence that this uncle could have been the perpetrator of the crime.

Counsel for Mr. Aragon argued: "I think in any criminal case my client has the right to present any defense that will

clear him of this matter.” (RT First Trial 8).

The court then ruled: “. . . You have every right to call any witness to the stand that you choose, and the court is not going to make any prior restraint on that right. The court, when a witness is called, will entertain any proper objection and rule on it at the time.” (RT First Trial 9).

Subsequently, during trial, Mr. Aragon presented his defense as outlined above using testimony by and about the uncle to impeach the testimony of the victim and to cause reasonable doubt in the minds of the jurors as to whether Mr. Aragon did commit the crime charged.

Four jurors voted the defendant not guilty, and a mistrial was declared (Appendix, Judgments and Verdicts Below.)

How the Federal Question was Raised:

Second Trial

Prosecution's Motion

The second trial commenced on April 3, 1985. Again, the district attorney made a motion in limine requesting that the court prohibit all evidence that the crime was committed by someone else, namely, the uncle, Felipe Ramirez.

Petitioner's Objections

Counsel for Petitioner strongly opposed the motion on the basis that it would deprive Mr. Aragon of his right to present a defense since the testimony by and about the uncle was vital both to *impeach* the testimony of the prosecution's only eyewitness, the victim herself, and to establish an alternate explanation of the facts which would show Petitioner to be innocent. Petitioner offered to the judge the transcript record of the first trial in which evidence had been admitted. The purpose was to show the court that the testimony by and about Felipe Ramirez did not consume

too much time,² there was no confusion or wandering afield from the basic issue of who inflicted the injury on Vicky, and no wild accusations were levied. Moreover, the record from the first trial clearly showed that the testimony by Felipe Ramirez directly impeached that of the victim. Lastly, Petitioner wanted to advance the reasons supporting admissibility of the evidence as articulated by the judge in the ruling in the first trial. (RT Second Trial 4-15).

During the course of the arguments, Petitioner stated: "It goes back to the idea of a *fair trial* . . . The Defense has the obligation and a *right to call the witnesses* they choose to . . . I have the right, as defense attorney, to present any facts that will shed light on the truth in this matter and also the innocence of my client." (RT Second Trial 4-8).

Court's Ruling

However, the judge in the second trial refused to look at Petitioner's offer of proof of the first trial record and, futher, indicated that Petitioner would be absolutely precluded from presenting the evidence relative to Felipe Ramirez.

Thus, the district attorney made a motion on April 3 for a blanket exclusion of the evidence pursuant to the court's previous statements during the discussions on the issue. The court then made the following unequivocal ruling on record:

The Court: That will be my order.

Ms. Williams: So . . .

The Court: You cannot mention the uncle.

Ms. Williams: I cannot mention the uncle?

I cannot call him as a witness?

The Court: Correct

The Court: (in the ensuing discussion with the prosecu-

²His testimony in the first trial took approximately seventeen minutes, and all of the testimony about him consumed less than fifteen minutes more.

tion): Miss Williams has been directed not to mention the uncle.

Grounds for Exclusion

A careful examination of the record reveals no articulated grounds for the wholesale exclusion of Petitioner's entire defense.

Result

As a consequence, the second trial differed significantly from the first in result. The jury voted unanimously that Petitioner be held guilty of the crime charged.

Petitioner then made a Motion for a New Trial with specific references to the U.S. Constitution and Petitioner's deprivation of rights thereunder.

Motion for a New Trial

The Notice of Motion filed on May 10, 1985 included pertinent excerpts of the first trial record and further arguments in support of Mr. Argon's contention that his Due Process rights had been violated by the complete exclusion of his defense. In summary, Petitioner argued:

During the original trial, the jury was deadlocked and a mistrial was declared for this reason. During the second trial, the trial judge refused to allow the testimony of one witness who had been heard by the jury in the previous trial and who was a material part of the defense case. Additionally, the primary witness for the prosecution made substantial and material changes in her testimony. The trial judge refused to allow the defense to impeach this witness's testimony . . . the jury was denied the opportunity to weigh either witness's credibility, and defendant was found guilty by a unanimous jury. (CT 201).

Appeal

Appellant's Notice of Appeal was timely filed on June 21, 1985. Oral argument was held on July 23, 1986.

In a decision filed on July 31, 1986, the Court of Appeal, Fourth Appellate District, Division Three, affirmed the lower court decision. (Appendix, Court of Appeal Opinion).

It was held that the *issue of the admissibility of the testimony by and about Felipe Ramirez was properly preserved for appeal*. (Appendix, Court of Appeal Opinion 4-5).

However, the court concluded that the blanket exclusion of the evidence tending to show another committed the crime in question was warranted under California case law, in spite of the recent California Supreme Court decision in *People v. Hall*, 41 Cal. 3d 826, 718 P. 2d 99, 226 Cal. Rptr. 112 (1986). Petitioner argued that the *Hall* ruling abrogated the strict California rule against admitting evidence of third party culpability. The court ruled that the *Hall* decision did not alter the law as it applied to Petitioner's case.

Furthermore, the court ruled against Petitioner's arguments that the exclusion of the evidence comprising the defense deprived Mr. Aragon of his Due Process and Compulsory Process rights.

Petition for Review to the California Supreme Court

Mr. Aragon filed a Petition for Review to the California Supreme Court on September 5, 1986, in which the same arguments were raised relative to an unconstitutional denial of his right to present a defense by the exclusion of all testimony by and about the victim's uncle, Felipe Ramirez. Review was denied on November 12, 1986.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE U.S. SUPREME COURT AND THE HIGHEST COURTS OF THE OTHER STATES

Background: California's *Mendez-Arline* Rule

In California, an anomalous line of cases produced an evidentiary rule unparalleled in its harshness toward, and special prejudice against, the defendant in a criminal case.

The *Mendez-Arline* rule,³ as it came to be called, has held that one accused of a crime may not introduce evidence at his trial that another person committed the crime, unless the defendant has very strong, convincing proof directly showing that the other person actually perpetrated the offense. Absent such proof, the defendant is precluded from following this avenue for creating doubt in the minds of jurors as to his own guilt.

In *People v. Mendez*, 193 Cal. 39, 223 P. 65 (1924), four Hispanic males had killed a rancher and had beaten his wife and children senseless. The defendants were precluded from introducing evidence that the crime was committed by other people, four Hispanic males answering the descriptions later provided by the wife and children. The previous day the rancher had argued violently with these four men who lived on his property; he confiscated their horse and took away the horse blankets they used as beds. Then, he flooded them out of their shack. The court prohibited the defendants from introducing any of this evidence because of the need for "orderly and expeditious" trials. *Id.* at 50-52, 223 P. at 69-70.

Later, in *People v. Arline*, 13 Cal. App. 3d 200, 91 Cal. Rptr. 520 (1970), this rule became expanded into an even

³The rule derives its name from the cases *People v. Mendez*, 193 Cal. 39, 223 P. 65 (1924), and *People v. Arline*, 13 Cal. App. 3d 200, 91 Cal. Rptr. 520 (1970). However, its appellation was the creation of Justice Poche in his dissent in *People v. Perry*, 104 Cal. App. 3d 268, 270, 163 Cal. Rptr. 522, 523, *cert. denied*, 449 U.S. 957 (1980).

more stringent standard of admissibility for evidence tending to show that a person other than the accused committed the crime charged.

Section 325 of the California Evidence Code (West 1966) which had then recently been enacted, allows courts to make discretionary rulings that evidence otherwise relevant and admissible is inadmissible on grounds that its "probative" value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Therefore, the court in *Arline* based the new standard on both the old *Mendez* rule and the newly enacted section 352, holding that for a defendant to be allowed to introduce evidence that someone else committed the crime, the accused must present "competent and substantial proof of a probability that this happened." *Arline*, 13 Cal. App. 3d at 204, 91 Cal. Rptr. at 522.

As a consequence, the defendant in *Arline*, charged with burglary of a gas station, was not permitted to present evidence that the crime had been committed by a specific individual answering the descriptions offered by the victims. This other individual had robbed a gas station in the same area two months later, and the modus operandi for both robberies were similar. The court concluded that such evidence would "create suspicion . . . in the minds of the jurors" relative to the guilt of the defendant and should therefore be excluded. *Arline*, 13 Cal. App. 3d at 202-205, 91 Cal. Rptr. at 521-523.

Subsequently, in *People v. Perry*, 104 Cal. App. 3d 268, 163 Cal. Rptr. 522, cert. denied, 449 U.S. 957 (1980), the courts applied the ruling in *Arline* to perpetrate what may have been one of the most flagrant violations of the constitutional right of an accused to present a defense ever to blot California jurisprudence.

Perry had been accused of attacking a woman in Golden Gate Park, choking and striking her. He attempted to introduce *seventeen points* of evidence to show that one Matthew Wolf had been the actual perpetrator. Wolf had robbed and raped a woman in the same park just an hour before the incident in issue, and had robbed and raped a woman in the same park three years prior to this. Both Wolf and Perry were black males, wore their hair in distinctive sectional braids that night, and were wearing blue pants. In both the rape an hour earlier and the one at issue, the women attacked were young, white females, both had been grabbed around the neck the same way and had been dragged off the path into the bushes. In each instance, the attacker started by trying to converse with the women on a path in the same small area of the park. *Id.* at 270-271, 163 Cal. Rptr. at 523.

None of the above evidence was admissible under the *Mendez-Arline* rule.

In the same month the *Perry* decision was rendered, the California Supreme Court decided *People v. Green*, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1, *cert. denied*, 449 U.S. 957 (1980). Green was accused of murdering his wife. At trial, he tried to present as his defense evidence that one Khan was the actual murderer. Khan had driven the victim to the place where she was murdered. He was a man of extremely violent propensities, he injected drugs habitually, he was in need of money at that time and he knew that the victim had either \$800 in cash or in drugs on her. Moreover, Khan told the police different versions of what had occurred that day, implicating Green only when the police threatened that Khan would be charged with the murder.

The California Supreme Court held the evidence inadmissible, and articulated the extremely elevated standard of admissibility for this type of defense, asserting that such proof must consist of "substantial evidence tending to

directly connect that person with the actual commission of the offense." *Id.* at 22, 609 P.2d at 480, 164 Cal. Rptr. at 13. Otherwise a criminally accused person may never avail himself of that defense regardless of its validity.

These cases form only a few examples out of many which illustrate that California courts fashioned a special rule designed to make it nearly impossible for defendants to introduce evidence that another person committed the crime, even if such evidence constituted the very crux of the defense. As Judge David Garcia has appropriately observed:

California courts, however, have singled out third party culpability evidence for rigorous evidentiary limitation so that there is practically no likelihood that a criminal defendant will be allowed to introduce such evidence . . . But if it is incontestable that a crime has occurred and there is an issue as to whether the defendant was actually the perpetrator, the necessary implication of a plea of not guilty is that some other person committed the act. *Garcia, Third Party Culpability Evidence: A Criticism of the Mendez-Arline Exclusionary Rule—Towards a Constitutional Standard of Relevance and Admissibility*. 17 U.S.F. L. Rev. 441, 442-46 (1983).

This was the state of California law at the time of the second trial of Petitioner when he was ordered not to call the victim's uncle to testify, nor to ask other witnesses about him.

However, just before Petitioner presented oral arguments in the Court of Appeal, a decision concerning the admissibility of third party culpability evidence was rendered by the California Supreme Court in *People v. Hall*, 41 Cal. 3d 826, 718 P.2d 99, 226 Cal. Rptr. 112 (1986). That decision abrogated the requirement that a defendant charged of a crime may not be allowed to present evidence that

someone else was the perpetrator unless the defendant had substantial proof thereof. However, it is unclear how the decision will affect future California law since the Court of Appeal, Fourth District, Division Three ruled that *Hall* would still not permit Petitioner to introduce testimony by and about the victim's uncle in order to establish the defense that the uncle, not Petitioner, was the actual culprit.

Thus, it appears that California courts continue to severely limit third party culpability evidence as a defense.

Conflicting Decisions of the U.S. Supreme Court

Under both the Compulsory Process clause of the Sixth Amendment and the Due Process clause of the Fourteenth Amendment to the United States Constitution, a defendant has the right to introduce exculpatory evidence in the form of witnesses whose testimony he may compel.

The Supreme Court of the United States has further elaborated:

The right to offer the testimony of witnesses and to compel their attendance, if necessary, is, in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as the accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Court held that the application of certain state evidentiary rules by state courts to the disadvantage of defendants may constitute a violation of the criminal defendant's Fourteenth Amendment Due Process rights. The Court concluded that while state rules of evidence are to be respected, they may

not be applied "mechanistically to defeat the ends of justice." *Id.* at 302.

Moreover, the Court in *Chambers* asserted that the defendant's constitutionally guaranteed right to confront witnesses is not restricted to those who testify against him, but also extends to any witnesses the defendant wishes to call to aid him in the establishment of his defense, his version or theory of the facts. *Id.* at 297.

The Court had previously reached the same conclusion by a different route, the Sixth Amendment, stating that a "person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — *a right to his day in court* — are basic in our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948) (emphasis added).

The precise issue of admissibility of third party culpability evidence had already been expressly ruled on by the Court in the early case of *Alexander v. U.S.*, 138 U.S. 353 (1891). The standard set forth mandated that evidence that another person committed the crime for which the defendant was accused should not be excluded unless it is "so remote or insignificant as to have no legitimate tendency to show that [the other] could have committed [the act]." *Id.* at 356.

Recent Decision in *Crane V. Kentucky*

The U.S. Supreme Court recently granted review on a writ of certiorari for a case analogous to the case at bar. In *Crane v. Kentucky*, 476 U.S. — (1986), state courts had precluded a criminal defendant from presenting his chosen defense by ruling inadmissible all evidence concerning the environment in which a confession had been made. A key point in Crane's defense was the credibility of the confession, though already correctly ruled legally voluntary. The defendant wished the jury to consider how credible the confession was in light of the surrounding circumstances. Crane maintained that it was possible that knowing these circumstances could cause reasonable doubt in the minds of

the jurors as to the validity of the confession, which comprised the main evidence against him.

Justice O'Connor, delivering the opinion for a unanimous Court, stated that notwithstanding the "wide latitude" left to state courts "to exclude evidence that is repetitive, only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues," the state courts erred in their "blanket exclusion of the proffered testimony" and "deprived [the defendant] of a fair trial." *Id.*

Furthermore, the Court pointed out that the state had not "advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence." *Id.* That criticism applies equally in the case at bar where the trial court offered no legal reasons on record for its wholesale exclusion of Mr. Aragon's defense. The Court of Appeal declared that calling the uncle to testify and asking other witnesses about him in order to show that he committed the crime instead of Petitioner was *irrelevant*. (Appendix, Court of Appeal Opinion 6). Such reasoning is not rational since it is always relevant to impeach the primary witness against the defendant (as did the uncle's testimony in the first trial), and since showing that another person committed the crime instead of the defendant disputes the main issue of the case.

Justice O'Connor's conclusions for the Court in *Crane* are particularly appropriate for the issue in Petitioner's case:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. We break no new ground in observing that an essential component of procedural fairness is an opportunity to be

heard... In the absence of any valid state justification, exclusion of this kind of exculpatory evidence *deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing'*. *Id.* (citations omitted) (emphasis added).

Conflicting Decision of U.S. Military Court

In *U.S. v Johnson*, 3 M.J. 143 (CMA 1977), the U.S. Court of Military Appeals decided a case closely on point to the case at bar. The defendant in a murder charge had sought to introduce third party culpability evidence in the form of a written confession by another that the other had committed the crime for which Johnson was on trial. This third party had refused on self-incrimination grounds, to testify. The lower court had excluded the written confession on the basis of the hearsay rule. Without this evidence that another had committed the crime, defendant was convicted. The U.S. Court of Military Appeals held that the exclusion had been an unconstitutional denial of the Due Process rights of the accused to present a defense, which rights must take precedence over evidentiary rules designed merely to expedite trials.

Conflicting Decisions of Other State Courts

The courts of other states have directly contravened the California decisions on the admissibility of third party culpability evidence and have followed, instead, the standards set forth by the U.S. Supreme Court.

For instance, the Minnesota Supreme Court has ruled:

Where the issue is whether in fact the defendant [committed the crime], evidence tending to prove that another person committed the [crime] is admissible. The purpose of evidence to show that another committed the [crime] is *not to prove the guilt of the other person, but to generate reasona-*

ble doubt of the guilt of the defendant. *State v. Hawkins*, 260 N.W. 2d 150, 158-59 (1977) (emphasis added).

Hawkins was more recently reaffirmed in the similar case of *State v. Deans*, 356 N.W. 2d 674 (1984).

Likewise, the Supreme Judicial Court of Maine stressed that after the prosecution has presented its version of the incident to such an extent that there is no doubt but that a crime did occur, it is absolutely imperative that the defendant not be prohibited by evidentiary rulings from offering evidence to support his theory that someone else committed the crime. "The court should allow the defendant wide latitude to present all the evidence relevant to his defense, unhampered by piecemeal rulings on admissibility." *State v. LeClair*, 425 A. 2d 182, 186 (1981).

Significantly, Wisconsin has explicitly criticized the California rule on third party culpability evidence as presented in *People v. Green*, 27 Cal. 3d 1, 609 P 2d 468, 164 Cal. Rptr. 1 (1980), discussed above. The Wisconsin court elucidated:

The *Green* court stated that there must be, in addition, evidence directly connecting a third person with the offense charged . . . We disagree only with the *Green* court's conclusion that such evidence must be *substantial*. We perceive this to be too strict a standard for the admissibility of such evidence . . . (R)elvant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. This rule does not say that the evidence must tend to prove a fact in a *substantial way*. We are convinced . . . to adopt a standard less severe than the California court; a better standard was developed in the early case of *Alexander v. United States*, 138 U.S. 353 (1891).

In that case, the United States Supreme Court fashioned the 'legitimate tendency' test. In other words, there must be a 'legitimate tendency' that the third person *could* have committed the crime . . . The 'legitimate tendency' test asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime. *State v. Denny*, 357 N.W. 2d 12, 16-17 (1984) (Citations omitted).

In sum, the California law here at issue is in direct conflict with U.S. Supreme Court rulings and those of the other states. A person accused of a crime in California may effectively be precluded from presenting his defense that another committed the crime in question while the same person accused of the same crime in another state would be permitted this defense. Moreover, California's treatment of third party culpability evidence contravenes the dictates of the U.S. Supreme Court relative to the constitutional right to present a complete defense.

Therefore, a uniform national ruling on this issue is vital in order to prevent continued disparity among the courts and to abrogate a peculiar California rule that is illogical, unconstitutional, against the national tide and against public policy.

CONCLUSION

In sum, when Petitioner was prohibited from calling the victim's uncle as a witness and precluded from questioning the other witnesses about him, it deprived Mr. Aragon of his constitutional Due Process and Compulsory Process rights since it formed the essence of his defense. Mr. Aragon was thereby prevented from presenting his version of the facts, which coincided with the medical evidence better than the theory of the prosecution. He was precluded from

impeaching the credibility of the prosecution's primary witness against him since the uncle's testimony directly contradicted statements under oath by the victim, as is evident from the first trial record of the uncle's testimony.

Although Petitioner was not *legally* required to present an alternate theory of the facts which would explain the victim's injury, it is necessary to do so as a *practical* matter when there is medical evidence of an injury to a child, at which a jury is rightfully outraged, and the only explanation offered at all is that of the prosecution.

People justifiably wish to see that someone answers for a crime. If the only person the jury is allowed to consider as the culprit is the defendant because he is prevented from introducing evidence showing that another might have committed the crime, the jury will be predisposed to convict the only person accused, despite the optimistic legal theory that all jurors start with the overwhelming presumption of the defendant's innocence.

The main flaw of the California standard as applied to Petitioner is that it severely disadvantages the innocent defendant who *knows* for certain that someone else had to have committed the crime. How is he to gather evidence to support what he knows to be the truth? While the prosecution has at its disposal such sophisticated investigative techniques and avenues as the police, science labs, searches and seizures pursuant to warrants, arrests, and interrogations, the accused must rely on his own mental faculties and meager investigative resources to ferret out the actual guilty party.

Yet, the California standard would prevent this defendant from presenting what evidence he was able to gather unless it constituted substantial proof. This concept seems to confuse the focus which should be on creating reasonable doubt as to the defendant's guilt, not on proving the guilt of another beyond a reasonable doubt.

Moreover, this exclusion of third party culpability evidence proceeds on the rationale that there are myriad defenses from which attorneys and defendants will choose; if one is rejected by the court, another may be selected instead for presentation to the jury. This viewpoint is supportable only if the choosing of a defense is a mere academic exercise existing in a vacuum of legal theory. However, in a world of factual reality faced by the accused, where appearances are often deceptive and blame misplaced, the *truth* may choose the defendant's defense for him. And, despite the court's personal feelings as to the quality of that defense, the policy of this nation has always been that the accused should be able to present that defense to a jury of his peers. That is all Mr. Aragon asks of the law and this Court.

ALTERNATE REMEDY SOUGHT

As an alternate disposition of Petitioner's case, Mr. Aragon respectfully prays for a *summary reversal* of, or a *grant, vacate and remand* to the Court of Appeal, Fourth District, Division Three, on the basis that the court misapplied the new ruling of *People v. Hall*, 41 Cal 3d 826, 718 P. 2d 99, 226 Cal. Rptr. 112 (1986).

DATED: 5 January 1987

Respectfully submitted.

SHEILA A. WILLIAMS**
 2510 Glenneyre
 Laguna Beach, California 92651
 Counsel of Record for Petitioner

**Counsel for petitioner wishes to acknowledge the assistance of Colleen Maas, J.D. candidate, in the preparation of this brief.

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
)	
Plaintiff and Respondent,)	G002929
)	
v.)	(Super. Ct. No. C-54196)
)	
CIPRIANO ALFARO ARAGON,)	OPINION
)	
Defendant and Appellant.)	
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APPEAL from a judgment of the Superior Court of Orange County, John H. Smith, Jr., Judge. Affirmed.

Sheila A. Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steven H. Zeigen, Deputy Attorney General, for Plaintiff and Respondent.

Cipriano Aragon was convicted by jury of child molestation with bodily injury. He contends the court erred in precluding him from protesting evidence that the victim's uncle was the actual perpetrator. He also argues the court erred in denying probation.

I

Seven-year-old Victoria O., her five-year-old brother Efrain and another five-year-old boy, Mauricio, went with Aragon to the company where he worked. The business was closed but Aragon had a key. Efrain and Mauricio waited in the car with the radio on while Aragon and Victoria went inside. Aragon lifted Victoria onto a table, pulled down her panties and stuck his finger into her vagina. She cried and hit him. He slapped her and warned her not to tell anyone. Efrain noticed Victoria was rubbing her eyes when she and Aragon returned to the car. Aragon then took all of the children to a convenience store for ice cream.

Victoria initially remained silent about the incident. The next morning her mother discovered blood stains in the little girls panties. Victoria explained it was caused by a popsicle. A medical examination disclosed recent vaginal tears and a torn hymen, which the doctor believed were the result of abuse. The injuries were consistent with the insertion of a finger or some other foreign object. After a nurse urged Victoria to tell the truth, she described what Aragon had done the night before. She repeated this to her mother and later the police.

At Aragon's first trial, Victoria's uncle, Felipe Ramirez, was called as a defense witness in an attempt to show he could have been the perpetrator. Ramirez admitted living in the same house with Aragon, Victoria and her family, and a number of other adults at the time of the incident. He also testified he moved to Chicago three weeks after Aragon was arrested. Ramirez admitted being home alone with the children during the afternoon of the day in question, before

the other residents arrived home from work. He later left the house and was gone for about two hours, until nine o'clock. Although he denied molesting Victoria, he did admit to punishing the children previously by putting them in the garage with the lights out.

The first jury was unable to reach a verdict and a mistrial was declared. The second trial began with the prosecutor's motion to preclude defense counsel from suggesting Ramirez was the perpetrator without first conducting a hearing to determine the admissibility of any such evidence. The court granted this request and defense counsel sought a clarification of the ruling to determine whether she was precluded from calling Ramirez as a witness. She made an offer of proof regarding proposed testimony to show Ramirez, not Aragon, might have molested Victoria. That offer included Ramirez' testimony from the first trial. She also proffered evidence Ramirez might have molested Victoria that evening at the house, when someone else heard the children crying. According to the offer of proof, Ramirez had in the past laid his head in the victim's lap and has asked Victoria to bring him a towel when he was nude. In response to the prosecution's motion, the trial judge clearly stated counsel could not call Ramirez as a witness. After further discussions the next day, however, that ruling was apparently reversed. The judge stated the defense could call any witness; he would rule on any objections as they arose.

II

Aragon contends the trial court prevented him from introducing evidence Ramirez was the one who molested Victoria. Initially, the Attorney General argues the issue is not properly preserved for appeal because the defense never actually called any of the witnesses, nor requested a hearing outside the presence of the jury to determine the admissibility of any proffered testimony. Although the confusion surrounding the trial court's conflicting rulings was raised in

Aragon's motion for new trial, the denial of that motion was unexplained. The record does demonstrate that counsel believed the court's ruling prevented her from calling Ramirez as a witness.

In light of the ambiguities, we resolve any doubts in favor of the defendant and conclude the question has been adequately preserved for appeal. The defense offer of proof and the prosecution's objection on relevancy grounds were clearly articulated. Moreover, the trial judge expressed his belief the testimony was irrelevant. Thus, the record is complete for purposes of appellate review.

III

In *People v. Hall* (1986) 41 Cal. 3d 826 our Supreme Court clarified the admissibility of defense evidence offered to show that someone other than the defendant is the perpetrator of the charged offense. In reviewing the so-called *Mendez-Arline* rule (*People v. Mendez* (1924) 193 Cal. 39; *People v. Arline* (1970) 13 Cal.App.3d 200), the court rejected language from *Arline* and its progeny which purport to require " 'substantial proof of a probability' that the third person committed the act; . . ." (*People v. Hall, supra*, 41 Cal.3d at p. 833).

The newly-articulated test in *Hall* lessens the defendant's burden: "To be admissible, the third-party evidence need . . . only be capable of raising a reasonable doubt of defendant's guilt." (*Ibid.*) If relevant under that standard, it is admissible "unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ((Evid. Code § 352)." (*Id.*, at p. 834.)

The *Hall* rule requires we first review the question of relevancy. Did the proffered evidence raise a reasonable doubt of Aragon's guilt? Aragon offered to prove Ramirez had the opportunity to commit the offense, which was arguably corroborated by someone else having heard at

least one of the children cry when Ramirez was in the house with them. Ramirez had reportedly placed his head in the victim's lap previously and might have exposed himself to her in the past. He moved to Chicago three weeks after Aragon was arrested, which the defense suggests evidences consciousness of guilt.

As *Hall* explains, "we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability . . . (E)vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall, supra*, 41 Cal. 3d at p. 833) The proffered evidence here suggests Ramirez had an opportunity to commit the crime, although not at the same place described by the victim. Indeed her version was corroborated by her brother who testified Victoria was rubbing her eyes when she returned to the car with Aragon. The evidence Ramirez fled only tenuously suggests his consciousness of guilt: He stayed in the area a full two weeks after the incident. There is no "direct or circumstantial evidence linking [Ramirez] to the actual perpetration of the crime." (*Ibid*) Thus, his testimony was irrelevant under *Hall*¹.

We are mindful the first jury's inability to reach a verdict suggests Ramirez' testimony in that trial created a reasonable doubt as to Aragon's guilt. However, we can only speculate why four jurors refused to vote guilty in the first trial. Aragon argues Ramirez' demeanor on the stand must have

¹ Aragon also argues that the court erred in not balancing, on the record, the probative value of the proffered evidence against its potential prejudicial effect. However, that analysis is foreclosed by a conclusion the evidence was irrelevant.

been a telling feature. Yet he failed to present that for the trial court's review, though invited to do so in a hearing outside the presence of the jury. Without more, we cannot fault the trial court's refusal to assume Ramirez' testimony was relevant simply because it might have been the motivating cause for four votes of not guilty in the first trial.

V

Aragon was convicted of violating Penal Code section 288, subdivision (a). An allegation of bodily injury was found true. (Pen. Code, § 1203.066, subd. (a) (2).) That allegation prohibited Aragon's consideration for probation. (*Ibid.*) Regardless, he argues the court erred in not at least considering probation, arguing California Rules of Court, rule 416 authorizes consideration of probation even though he is statutorily ineligible. He misreads the code and applicable court rules. Rule 416 sets out guidelines to consider in determining whether the case is "unusual," where the defendant is eligible for probation despite a statutory preference against it. However, that rule only relates to sentencing statutes which create an express exception for "unusual" cases. (See, e.g., Pen. Code, § 1203.065, subd. (b).) Here, the bodily injury finding under Penal Code section 1203.066, subdivision (a) (2) precludes probation and does not authorize its consideration under the "unusual" case criteria. There was no abuse of discretion in denying probation because there was no discretion involved. Aragon is ineligible for probation. (See *People v. Holt* (1985) 163 Cal.App.3d 727.)

Judgment affirmed.

/s/ WALLIN

Wallin, J.

WE CONCUR:

/s/ TROTTER

Trotter, P.J.

/s/ SONENSHINE

Sonenshine, J.

JUDGMENTS AND VERDICTS BELOW

Excerpts reprinted verbatim

FIRST TRIAL

C-54196 *People v. Aragon*

The Court having received a written communication from the jury indicating they were unable to reach a verdict, the Court inquired of the foreman as to whether it was her opinion that further deliberation could result in a unanimous verdict and she replied in the negative. The Court voir dired each juror individually as to whether further deliberation could result in a unanimous verdict, and each juror answered in the negative. Defendant and counsel stipulated to a mistrial. The Court declared a mistrial . . . ENTERED 11-26-84. (CT 277).

SECOND TRIAL

VERDICT

The People of the State of California v. Cipriano Alfaro Aragon

No. C-54196

We the Jury in the above entitled action find the Defendant, Cipriano Alfaro Aragon *GUILTY* of the crime of felony, to wit: Violation of Section 288(a) of the Penal Code of California (LEWD OR LASCIVIOUS ACT UPON A CHILD UNDER FOURTEEN), as charged in Count I of the Information.

Dated 10 April, 1985 (CT 197)

SENTENCING

THE COURT: Sentence of the Court that probation is denied . . . And I will sentence the Defendant to the low term of three years in the state prison. (RT Second Trial 343).

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3, No. G002929

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

CIPRIANO ALFARO ARAGON

Appellant's petition for review DENIED.

BIRD
Chief Justice